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CHARLES ELMORE CROP

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 276

W. LEE CLEMENTS AND J. L. BRITT.....*Petitioners*

v.

R. W. BRONAUGH, GEORGE BLACKBURN AND E. T. HORNOR (Commisioners of White River Drainage District of Phillips and Desha Counties, Arkansas) AND WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS .....*Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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W. Lee Clements and J. L. Britt, Petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas and final order denying rehearing, the judgment having been entered in the above entitled case on April 23, 1951, and the final order having been entered on May 28, 1951 (R. Vol II, 11, 20).

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas in the present action (R. Vol. II, 11-17) delivered April 23, 1951, has not yet appeared in the official reports, but it is reported at 239 S. W. 2d 1. A copy is appended hereto as Appendix B. No opinion was rendered with the final decision of May 28, 1951, denying rehearing. (R. Vol. II, 20.)

The opinion of the Supreme Court of Arkansas in the previous Chancery proceeding (R. Vol. II, 1-8), delivered April 25, 1949, is reported at 215 Ark. 195, 219 S. W. 2d 922. A copy is appended hereto as Appendix C.

STATUTES INVOLVED

Necessarily involved in the action are those statutes of Arkansas under which the Respondent District was established and those governing its operation. Pertinent provisions are summarized in Appendix A hereto, where, in addition, there will be found reference to the flood control statutes (Federal), also involved.

STATEMENT OF MATTER INVOLVED

Petitioners are owners of land lying within the boundaries of a local improvement district, White River Drainage District of Phillips and Desha Counties, Arkansas. Respondents are the District itself and its Commissioners. The District was organized in the year 1919, embracing, originally, some 169,000 acres of land, and its fundamental purpose was to render the land productive by constructing an integrated local improvement consisting of levees, drainage ditches, flood gates, pumping plants and other works to eliminate excess flood and surface waters. The items mentioned and planned were complementary to each other, all constituting the improvement for the construction of which the District was

founded. Full benefit from each item was recognized as being not obtainable unless all the others were constructed. Levees were to prevent White and Mississippi River flood waters from inundating the lands, and the proposed drainage ditches and pumping plants were to remove rain and seepage water which otherwise would inundate the lands by virtue of the impounding effect of the levees. (R. Vol. I, 6, 7, 9, 12.)

All these things were contemplated in the original plans of the District and were the foundation of the assessment of benefits computed so as to furnish a basis for taxation for the construction of the improvement, and lump-sum assessment of benefits was set opposite each tract of land, contemplating the benefits which would accrue to it from the complete improvement (levee, ditches, outlets and pumping plants) which would eliminate excess water. (R. Vol. I, 8-9.) Petitioners' lands, some 5,101.05 acres, were originally charged with lump-sum anticipated benefits aggregating $340,447.00, against which taxes could be levied for construction of the project. (R. Vol. I, 4-6.)

No construction was begun until after the passage by Congress of the Overton Flood Control Act of June 15, 1936, C. 548, 49 Stat. 1508 et seq., particularly Sec. 5, 49 Stat. 1509. (R. Vol. I, 6.) Under that public law, the District and landowners were relieved of a tremendous burden in that the Federal Government undertook to construct and proceeded to construct a levee along the East bank of the White River (the West boundary of the District) at no cost to the District, except for the rights of way. (R. Vol. I, 6.) The original assessment of benefits by the District, as to the levee, was thus, obviously, no longer necessary to provide a basis of taxation for financing its construction. The Federal Government project was conceived and executed as a common or general improvement as a part of the National Flood Control

Program. (R. Vol. I, 6, 12-13.) The District, relieved of the tremendous construction costs, by this happy coincidence of the general welfare with the District's own local aims, was obliged thereafter to merely maintain the levee with its own funds.

The District has not provided the pumping plants which were originally contemplated, has taken no actual steps toward their construction, and its new tax levy order and its newly conceived bond issues, mentioned below, are wholly inadequate to provide them. (R. Vol. I, 9-11.) The tax order expressly so states. (R. Vol. I, 118.) The taxes under the new order are to be levied annually until 1965 against the benefits originally assessed against the lands for pumping plants, levee and drainage ditches, yet it is impossible for pumping plants to be constructed under the new tax program, there remains no occasion for construction of a levee, and no maintenance tax for the levee has ever been established. (R. Vol. I, 10, 113-118.)

The lands of low elevation in the South and West portions of the District are particularly affected by the lack of pumping plants and by the continuance on the part of the District to tax against the originally conceived benefits. Rainfall and seepage water naturally drains toward and stands in these areas, inundating them for long periods, lessening, and in some respects nullifying the benefits which were to have accrued to the lands, and virtually destroying their value. (R. Vol. I, 7, 9-10, 12.) The ditch work done by the District aggravates the condition by accelerating the flow of surface waters to the South and West, the total result being that the lands are being used and appropriated as a reservoir for the concrete benefit of the higher lands in the District. (R. Vol. I, 9-10.)

The District on September 2, 1949, petitioned for and obtained on the same date, without notice to Petitioners

and without any opportunity for them to be heard (R. Vol. I, 20), a tax levy order levying annually three-fourths of one per cent of the assessment of benefits to support a serial bond issue of $230,850.00, a portion of the bonds to mature annually until 1965, when the last will mature, and to provide for "maintenance and expense of operation of the District." (R. Vol. I, 113-118.)

Over the life of the new bond issue Petitioner Clements will be taxed $30,520.16 and Petitioner Britt will be taxed $10,336.80, yet their lands will be in no better condition in 1965 than now, because no provision whatever is made for pumping plant construction, an indispensable item if the lands are to be rendered productive and free of excess water as originally planned when the District was established. (R. Vol. I, 11.)

Petitioners brought this action in the Circuit Court ("court of law"), to have the District, in a word, either construct the improvement or cease taxing against the benefits conceived for the purpose of financing the construction, and in addition they would have the District cease levying taxes against levee construction benefits, since it was relieved of the necessity of this construction. They specially set up and claimed their rights to due process of law and to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States as requiring decision in their favor, as shown in the section of this petition entitled "Questions Presented".

In opposition to the Petitioners, the Respondents pleaded res judicata, stating that a previous Chancery proceeding (R. Vol. I, 23-108, Vol. II, 1-11, and Exhibits) between the same parties and others barred this litigation in Circuit Court. The previous Chancery proceeding was commenced May 27, 1947. (R. Vol. I, 17.) It involved the District affairs up to that time, including past tax orders. (R. Vol. I, 23-29, Ex. Bk. 49, 50,

72-86.) That proceeding sought an injunctive decree compelling the District to refund all past taxes paid, declaring void and of no effect the past acts of the District, compelling by injunctive decree a reassessment of benefits in view of conditions existing at time of filing of suit (May 7, 1947) and refund of past paid taxes. (R. Vol. I, 28-29.) In addition they prayed for the injunction to order Commissioner to file the annual reports required by law. (R. Vol. I, 29.)

The Plaintiffs in the previous Chancery proceeding complained of the District's past use of levee benefits, under tax orders other than the order involved in this present action, as part of the basis for taxation, seeking injunctive relief and refund of taxes paid. They also complained, in the previous Chancery proceedings, of the failure of the District to construct pumping plant, of the variations in the Federal levee and the levee planned for the District originally, and of the piecemeal ditch work in the North end of the District area which had in the past accelerated the flow of water onto the lands in the Southwest part of the District, and of the failure of the Commissioners to file the required annual reports of receipts, expenditures and progress. (R. Vol. I, 23-29.) For all of these things, the Plaintiffs there sought injunctive relief.

A Demurrer asserting lack of jurisdiction in Chancery and asserting failure to state a cause of action was sustained to all of the complaint in the previous action, except the allegations charging that the plans of the improvement had been changed (R. Vol. I, 29-30), the Chancery Court finding after trial that they had not been changed materially, that no part had been abandoned at that time, that "when the improvement is completed" the assessed benefits are just and equitable, that the policy of the District is to complete the improvement, and that

the complaint should be dismissed for want of equity. (R. Vol. I, 55.)

On appeal the Chancery decree was affirmed, the opinion of the Court (R. Vol. II, 1-8) appearing at 215 Ark. 195, 219 S. W. (2d) 922, the Court holding that the Chancery Court lacked jurisdiction (in the sense of "power") in the case because fraud was not alleged, remedies in the law courts being "exclusive" in the absence of fraud, that Plaintiffs there had waived the right to object to past acts of the District and the plans of improvement had not been *physically* changed to any material degree up to that time, and that the landowners themselves had requested that work be delayed for the period of World War II and for prior periods, hence could not object or obtain the relief demanded, at least in equity, on account of the previous delays.

On the basis of the previous Chancery proceedings, the Circuit Court in the present action sustained Respondents' plea of res judicata. On appeal to the Supreme Court of Arkansas the decision was affirmed, the Supreme Court not only sustaining the plea of res judicata but also holding that no change in plans or *conditions* from those existing in the former Chancery proceeding was shown which would warrant reassessment of benefits at this time. The latter holding would appear, necessarily, to constitute a decision on the merits of the claims made by Petitioners in the present action, based on their rights, under the Fourteenth Amendment, for in the period between the two actions the assessment of benefits was used as the basis of the new tax order extending for fifteen years into the future, after the period of delay in construction (solicited by landowners) had ended. The newly launched program of construction (omitting necessary parts) and the use of benefits as the basis of taxes to support it did not exist at the time of the previous Chancery action and questions respecting it could not conceivably have been

adjudicated in the earlier proceeding. It is with these things that the present action is concerned.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on April 23, 1951 (R. Vol. II, 11). Petition for rehearing (R. Vol. II, 17-20) was denied on May 28, 1951 (R. Vol. II, 20). The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1257 (3), Judiciary Act of June 25, 1948, c. 646, 62 Stat. 929.

1. It is claimed that use by Respondents of benefits from the Federal levee, constructed at Federal cost in the national interest for flood control, as the basis of local taxation under a recently obtained local tax levy order, is manifestly arbitrary, is unreasonably discriminatory as to petitioners, and is a plain abuse of power amounting to confiscation, depriving Petitioners of their property without due process of law and denying to them equal protection of the laws in controvention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. Sums equivalent to the "general benefits" are being exacted, which even if done by the United States would place a public burden on private shoulders—charging expense for national welfare to a few persons and thereby unreasonably discriminating against the few. The action when taken by the District, which did not all construct the levee, becomes a manifestly arbitrary course in addition to one unreasonably discriminatory. The Federal questions respecting the legality of the Respondents' exacting taxes for its own purposes (to effectuate which an adequate portion of the total assessment of benefits other than levee benefits is available) against benefits from the levee built as a general or common improvement is predicated upon the allegations in the petition by which

the action was commenced. (R. Vol. I, 6, 12, 13.) They were presented at the pre-trial conference, and express reference to Petitioners' special reliance upon the due process clause and upon the equal protection clause appears in the pre-trial Order rendered by the trial court, dismissing the action. (R. Vol. I, 21.) Express exceptions to the findings and Order were saved (R. Vol. I, 22), and express acknowledgment of Petitioners' reliance upon those clauses appears again in the opinion on appeal (R. Vol. II, 13-14), particular reference being made to the question of the District's exacting special taxes from Petitioners on account of the general or common improvement. (R. Vol. II, 15-16.)

Reliance on the constitutional provisions was reiterated in the Petition for rehearing (R. Vol. II, 17-20).

The state court necessarily denied to Petitioners these specially set up and claimed rights by its judgment (R. Vol. II, 11) and in its opinion (R. Vol. II, 11-17, and Appendix B hereto), in both of which it denied all relief. From the opinion, it appears that these questions involving the Federal levee were decided upon two inconsistent bases:

First, it is said that the questions were raised in the previous Chancery action and are not to be determined on the merits in the present proceeding. (R. Vol. II, 14-16.) This conclusion was reached notwithstanding the holding by the same court in the previous Chancery action that the Chancery Court had no jurisdiction (power) to determine these and other questions presented, the remedy at law, by petition to the law (circuit) court for reassessment of benefits being "exclusive" in the absence of fraud. (R. Vol. II, 6.) It seems that the only levee problem considered on its merits in the previous Chancery proceeding was whether the Federal levee was so physically different in construction and location from the theoretical district levee (never built) as to be a materially different undertaking, it being found that the

Federal levee actually afforded even better protection from river overflow. (R. Vol. II, 6-7.)

Second, it is said that no such change in plans or conditions from those existing in the previous Chancery proceeding are shown in the present action to warrant reassessment. (R. Vol. II, 16.) If the questions be regarded as having been disposed of by this conclusion, the merits were necessarily passed upon adversely to Petitioners in respect to the constitutional rights specially set up and claimed; for taxation by use of the levee benefit under the new tax order, extending for fifteen years into the future, did not commence until long after the previous chancery decision, and objections to their use could not conceivably have existed prior to the present action. By virtue of this circumstance, the effective denial, on the merits, of Petitioners' claims was accomplished, and the previous Chancery decision became actually mere *authority* in these respects rather than res judicata.

2. It is claimed that failure to construct pumping plants to remove excess water impounded by the levee and excess water draining naturally to Petitioners' lands from the higher areas of the District (at an accelerated rate and volume due to piecemeal work done in the north portion), failure to take any steps to that end, admitted inadequacy of the new tax order extending through the year 1965 to build pumping plants (R. Vol. I, 113-118), and the lack of any concrete assurance whatsoever that they will ever be built, constitutes actual appropriation of Petitioners' lands for use as a reservoir for the higher areas, a convenient substitute for pumping plants, for purposes of benefiting the higher lands, at the expense of Petitioners. (Proposed pumping plant and drainage cost was estimated at some $2,000,000.00 years ago under the comparatively low-cost conditions then existing. (See R. Vol. I, 45, and Exhibit Book, Page 57.) The new tax order cannot accomplish the construction. (R. Vol.

I, 113-118 and 11.) This results not only in physical confiscation, but also, since taxes under the new order are levied against actually non-existent pumping plant benefits, it results in denial of due process in the sense that special exactions are made without actual benefit to offset them, as well as in unreasonable discrimination against Petitioners in favor of the owners of higher lands in other areas of the District. The assessment of benefits now being used for the tax basis has become substantially in excess of the benefit actually received or which can reasonably be expected to be received at any time in the future.

The Federal questions respecting the failure to build pumping plants while continuing to tax against theoretical benefits which were to have been derived from them are predicated upon allegations of the petition by which the action was commenced (R. Vol. I, 3-15, particularly 7-13). Special reliance was placed upon the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States at the pre-trial conference and express reference appears in the pre-trial order overruling the contentions (R. Vol. I, 21), to which exceptions were expressly saved (R. Vol. I, 22). On appeal the Court, in its opinion, again acknowledged the raising of the Federal questions (R. Vol. II, 13-14), and they were again asserted in the Petition for rehearing (R. Vol. II, 17-20).

The state court necessarily denied to Petitioners these specially set up and claimed rights by its judgment (R. Vol. II, 11), in its opinion (R. Vol. II, 11-17), and in its final order denying rehearing (R. Vol. II, 20), in all of which it denied all relief and any substantial effect to those rights. From the opinion it appears that the claims were passed upon on inconsistent bases, as in the instance of the questions involving the levee benefits:

First, it is said that the previous Chancery proceeding called for application of the doctrine of res judicata to these presently asserted claims (R. Vol. II, 14-16). This conclusion was stated notwithstanding the holding by the same court in its previous opinion (R. Vol. II, 6, 7-8) that the Chancery Court, there, had no power, in the absence of allegations of fraud, to determine the questions and that the "exclusive" remedy was by petition to the law court for reassessment. The conclusion is stated, further, notwithstanding the circumstances that the period of delay, held by the previous opinion to have been solicited by the landowners (R. Vol. II, 4-5, 7, 8) has now clearly ended. (R. Vol. II, 10-11, 109-118.)

Second, it is said in the opinion in the present proceeding that no conditions are shown which warrant reassessment of benefits at this time and that the building of pumping plants, though necessary at some time unstated, need not be undertaken now. (R. Vol. II, 16.) The Court left open the question as to when that proper time will come, stating merely that pumping plants may be constructed as the "last" stage of the work, although it is obviously within the absolute control of the Respondents themselves when that "last" stage will be reached. (R. Vol. II, 16.). The holding respecting pumping plants was rendered without any evidence of conditions existing at the present time; for Petitioners were not permitted to present their case in the trial court; yet the necessary effect of the holding is to determine adversely to Petitioners the constitutional righs set up and claimed.

3. It is claimed that in the present proceeding the misapplication of the doctrine of res judicata deprived Petitioners of all existing remedies for the enforcement of their constitutional rights set forth above, which the state had no power to destroy, and thus denied them any real opportunity to present their case and protect those rights. This, in itself, is a denial of due process of law,

in its primary sense, under the Fourteenth Amendment to the Constitution of the United States. Petitioners were deprived of property without due process of law to the same extent as and perhaps even more clearly than were petitioners in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, though by mechanics involving different labels.

Petitioners had been denied consideration of their claims in the previous Chancery proceeding on the ground that equity had no "jurisdiction" to determine them and that in the absence of fraud only the law court had such power. (R. Vol. II, 6, 7-8.) It must be observed further that the new tax levy order, involved in the present proceeding, with the assessment of benefits as its very foundation, and rights arising in connection with it, were not in existence at the time of the previous Chancery proceeding and could not conceivably have been there considered or adjudicated, and it must be observed that the new order was obtained after the period of delay in construction had ended. The previous Chancery proceeding was instituted in May, 1947 (R. Vol. I, 17) and was terminated by denial of petition for rehearing on appeal on May 23, 1949 (R. Vol. II, 20). The new tax order was obtained on September 2, 1950 (R. Vol. I, 20, 113) and incorporated into this proceeding at the pre-trial conference (R. Vol. I, 19-22). These circumstances would appear to render the term "res judicata" as employed in the present proceeding a mere label, which, by virtue of automatic consequences, effectively deprived Petitioners of any real opportunity to be heard in any court of the state.

The Federal question respecting the misapplication of res judicata was presented at the pre-trial conference, and Petitioners' special reliance upon due process of law under the Fourteenth Amendment to the Constitution of the United States was noted expressly in the Order of the trial

court (R. Vol. I, 20-21), to which exceptions were saved (R. Vol. I, 22). It was noted in similar manner in the opinion of the Supreme Court of Arkansas (R. Vol. II, 13-14), and the matter was again urged in the petition for rehearing (R. Vol. II, 17-20). The necessary effect of the state court's decision was to deny the claimed right to due process of law in the primary sense, by its judgment (R. Vol. II, 11), its opinion (R. Vol. II, 11-17), and by its denial of rehearing (R. Vol. II. 20).

QUESTIONS PRESENTED

(In all questions the terms due process of law and equal protection of the law invoke the clauses of the Fourteenth Amendment to the Constitution of the United States.)

1. Whether Petitioners have been and are being deprived of their property without due process of law, by manifestly arbitrary action, by the Respondents' levying taxes for all of its "local" purposes against benefits theoretically accruing to Petitioners' lands from a levee constructed as a general or common improvement by the United States with public funds as a part of the national flood control program.

2. Whether Petitioners have been and are being denied equal protection of the laws, by unreasonable discrimination, by the Respondents' action in the respects stated in question 1.

3. Whether the Petitioners are deprived of property without due process of law by the taxation against theoretical benefits, unrealized and unable to be realized in the foreseeable future, if ever, and substantially in excess of realizeable benefits, by use of Petitioners' lands as a reservoir, and by failure to construct the complete improvement, anticipation of which furnished the sole reason and consideration for the tax basis.

4. Whether Petitioners are denied equal protection of

the laws by unreasonable discrimination in favor of other areas of the District, by Respondents' actions and omissions in the respects stated in queston 3.

5. Whether Petitioners have been deprived of property without due process of law in the primary sense—without any real opportunity to be heard as to their contentions based on the constitutional rights stated in the preceding questions, by virtue of the particular application made of the doctrine of res judicata.

6. Whether the Petitioners are deprived of their property without due process of law by the conduct of the District's affairs, in a manner arbitrary as to them, under existing conditions.

7. Whether Petitioners are denied equal protection of the laws, and unreasonably discriminated against, by the conduct of the District's affairs, under existing conditions.

8. Whether the Petitioners have been deprived of their property without due process of law, in the primary sense—without any real opportunity to defend their rights, by the decision of the Supreme Court of Arkansas sought to be reviewed.

9. Whether Petitioners have been deprived of property without due process of law or have been denied equal protection of the laws by the Respondents or by the decision review of which is sought.

SPECIFICATION OF ERRORS

(In each specification the terms "due process of law" and "equal protection of the laws" invoke the clauses of the Fourteenth Amendment to the Constitution of the Unied States.)

1. The Court erred in holding that taxation against Federal levee benefits did not deprive Petitioners of due process of law.

2. The Court erred in holding that taxation against

those levee benefits did not deny to Petitioners equal protection of the laws.

3. The Court erred in holding that denial of relief either in the form of reassessment or progress toward completion of the improvement did not deprive Petitioners of due process of law.

4. The Court erred in holding that the denial stated in specification number 3 did not deny to Petitioners equal protection of the laws.

5. The Court erred in holding that the sustaining of the plea of res judicata did not deprive Petitioners of due process of law.

6. The Court erred in holding that the conduct of the District's affairs did not deprive them of property without due process of law.

7. The Court erred in holding that the conduct of the District's affairs did not deny to Petitioners equal protection of the laws.

8. The Court erred in affirming the Order of the Circuit Court of Phillips County, Arkansas, from which the appeal to it was taken.

9. The Court erred in refusing to grant relief to Petitioners.

10. The Court erred in failing to hold in respect to each of the matters to which reference is above made that Petitioners were deprived of property without due process of law or were denied equal protection of the laws.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

With respect to the matter of the failure of Respondents to provide pumping plants, the decision of the state court concluded that there was no occasion presented for lowering the existing assessment of benefits or for granting, alternately, relief in the form of requiring the Respond-

ents to complete the improvement. In effect, the state court held that Respondents may constitutionally levy local taxes against an assessment of benefits which is substantially in excess of actual benefit receivable at any foreseeable time, which has become manifestly arbitrary and which has become unreasonably discriminatory, when petitioners' position is compared to that of the owners of the higher land in the District which does not require pumping plants for realization of actual benefits. By the decision, the state court decided Federal questions of substance, involving the due process and equal protection clauses, in a way probably not in accord with numerous decisions of this Court. The use of theoretical pumping plant benefits as a basis for taxation, when the pumping plants do not exist and are not to be constructed at any foreseeable future time, deprives Petitioners of their property without due process of law under the established principles that the only justification for special assessments is that the property upon which they are imposed is in fact peculiarly benefited or will be within a reasonable time, and that the owners do not in fact pay anything in excess of what they receive. Further, the failure to construct the pumping plants, resulting in use of Petitioners' lands as a reservoir for the benefit of other areas of the District, denies to Petitioners equal protection of the laws.

It is submitted that the state court's decision is probably not in accord with the following decisions of this Court:

Norwood v. Baker, 172 U. S. 269;

French v. Barber Asphalt Paving Co., 181 U. S. 324;

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55;

Kansas City Southern Railroad Co. v. Road Improvement District No. 6, 256 U. S. 658;

Martin v. District of Columbia, 205 U. S. 135 (in which this Court quashed an assessment which was merely somewhat in excess of actual special benefit, even where the assessment was computed on actual cost of the improvement to the taxing authority);

Road Improvement District No. 1 of Franklin County, Arkansas, v. Missouri Pacific Railroad Co., 274 U. S. 188;

Myles Salt Co. v. Iberia and St. M. Drainage District 239 U. S. 478;

Georgia Railway & Electric Co. v. Decatur, 295 U. S. 165 (stating the principle that the local tax burden is imposed without compensating advantage to the taxpayer the arbitrary abuse of power is plain);

Nashville, Chattanooga & St. Louis Railroad Co. v. Walters, 294 U. S. 405.

District of Columbia v. Georgiana Thompson, 281 U. S. 25.

2. With respect to the Federal questions arising in connection with local improvement district taxation against assumed benefits arising from a general or common improvement constructed by the United States in the general interest, review of the conclusions reached by the Supreme Court of Arkansas is desirable for special and important reasons. The extent to which a local taxing district may capitalize upon the benefits arising from Federal government projects is a question of nation-wide importance, particularly for the reason that, in recent years, the scope of Federal activity in this respect has enormously increased. It is believed that, at least in the context of flood control projects such as the Federal Levee involved in this action, the questions have not been heretofore determined by this Court.

To the extent that these questions have been involved in actions decided by this Court, in other contexts, it is believed that the decision of the Supreme Court of Arkan-

sas is probably not in accord with the decisions of this Court in those actions. The Federal levee in this District is a general or common improvement and the respondent district is attempting to capitalize on necessarily "general" benefits or benefits incidental to the "general" improvement. It would seem from the statements of principle appearing in the decisions cited above in connection with the problem of pumping plant construction that "special" benefits arising from a "local" improvement, rather than "general" benefits furnish the only justification for special taxation. Under those decisions if an assessment is substantially in excess of "special" benefits, property is taken without due process of law; as it is further when the taxing authority uses the receipts not for the cost of the improvement but for other purposes. The distinction between local and general improvements, and their incidents, has long been recognized among the states (for example, Sears v. Street Commissioners of Boston, 173 Mass. 350, Washington Ave. 69 Pa. St. 352, Hammett v. Philadelphia, 65 Pa. 155, Waukegan v. De Wolf, 258 Ill. 374, Hinman v. Temple, 133 Neb. 268), one of the incidents being that those general in nature do not generate benefit upon which special taxation may be imposed. This Court, in New Orleans v. Warner, 175 U. S. 210, at Page 141, apparently endorsed the principle in its express reference to Sears v. Street Commissioners of Boston, 173 Mass. 350, a decision which discussed and effectively applied it.

It is believed that the question whether local taxation against benefits arising from a Federal general improvement unreasonably discriminates against those few members of the general public upon whom the tax is laid has not heretofore been determined by this Court. As noted above, the question is obviously one of importance due to recent expansion of Federal activity, particularly in the field of flood control projects.

3. There are special and important reasons for granting a writ of certiorari as to the question whether in this case the Petitioners have been deprived of property without due process of law by virtue of the claimed misapplication by the state court of the doctrine of res judicata. In the present action the doors of the "law" court were closed to Petitioners by the application of this doctrine, although in the previous "chancery" decision (the basis of the pleading of res judicata) the doors of "Chancery" were closed to Petitioners on the ground that the Chancery Court, in the absence of fraud, had no power to determine the substantive questions or to grant any relief. In addition, the present action involves rights arising in connection with a program of construction and a new tax order extending for 15 years, which were not in existence at the time of the former suit. Petitioners claim that the application of the doctrine of res judicata in this case results in denying to them any real opportunity to be heard in any state court. If this claim is well founded, the State Court decision is, in its necessary effect, probably not in accord with applicable decisions of this Court. There would appear to be no question but that the Federal guaranty of due process extends to state action through its courts. A decision of importance, with which the present state decision is probably not in accord, is *Brinherhoff-Faris Trust & Savings Co. v. Walter O. Hill,* 281 U. S. 673. In that case, the State of Missouri, through one of its courts, was held to have deprived a person of all existing remedies for the enforcement of a right which the state had no power to destroy, and the deprivation itself was held to violate due process in its primary sense. In the present action, the mechanical tool employed by the State of Arkansas, the doctrine of res judicata, is a different one from that which was employed in the Brinkerhoff case, but the net effect of the decision by the Arkansas Court is the same as that of the decision of the

Missouri Court in the Brinkerhoff-Faris case. The claimants were given no real opportunity to present their claims. The result seems particularly harsh for the reason that shortly before the present decision, the Arkansas court in Dermott Drainage District v. Cherry, 217 Ark. 829, at 837-838, expressly offered to other persons, in somewhat similar circumstances, the machinery of the "law' courts when it found that their first action was improvidently brought in chancery.

This question is obviously important as a matter of general fundamental conceptions of justice, as may be observed from the several opinions in *Angel v. Bullington*, 330 U. S. 183.

The question would appear to be of special importance, further, for the reason that an arbitrary decision in this respect by a state court, if permitted to stand, will necessarily make the jurisdiction of this Court dependent upon the will or unreasonable conclusions of the various state tribunals. The jurisdiction of this Court depends upon presentation of Federal questions, whereas, the scope of the doctrine of res judicata, when normally and properly applicable, would present only questions of local law not reviewable in this Court. If the labeling of a decision by the name res judicata by a state court is sufficient to relegate the matters involved to the category of "local" questions, no matter how inappropriate the label, this Court's jurisdiction may be seriously curtailed. In other contexts, such as class actions, this Court has not given the label such potency. *Hansberry v. Lee*, 311 U. S. 32. In that case, although the petitioners there were not parties to both state suits involved, this Court, speaking through Mr. Justice Stone, stated the principle which would appear to be applicable to any action in which res judicata is improperly applied in the following language:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose

and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process, it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indem. Co. v. Rupp, 235 U. S. 261, 373, 59 L ed 220, 224, 35 S. Ct. 37."

Whenever a person has been denied a real opportunity to be heard, whether by lack of notice or whether, though physically in the court room, he is given no real hearing, the principle quoted above should apply.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 22, 1951

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APPENDIX A

STATUTES

ARKANSAS STATUTES

1. Respondent District was organized and has operated under Act 279 of 1909, of the General Assembly of Arkansas, as amended and supplemented. The statutory provisions appear at 2 Ark. Stats., 1947 Annotated, Sections 21-501 to 21-574. Among the provisions, of interest, are the following:

Section 21-501 provides for the establishment of drainage districts;

Section 21-513 provides for the assessment of benefits to accrue to each tract by reason of the improvement proposed;

Section 21-517 provides for reassessment in the event of alteration of the plans of the improvement at any time, directing the Commissioners to increase or decrease the assessments which have become inequitable. The section further provides that reduction in assessments shall be paid for as damages secondary and subordinate to the rights of the holders of outstanding bonds.

Section 21-519 provides that reassessment may be made not oftener than once a year;

Section 21-542 provides that the Court shall render a tax levy order "sufficient to pay the estimated cost of the improvement" plus 10 per cent for contingencies, payable in annual installments by the owners of the real property of the District. The section provides that the remedy against the tax assessment ("sufficient to pay the estimated cost of the improvement") shall be by appeal within 20 days. (No provision for notice to persons who might wish to appeal is provided.) The section further provides that in the event the Commissioners determine that it would not be to the advantage of the District to

proceed immediately with construction of the improvement they may levy a special tax covering preliminary expenses. This section, prior to its amendment allowing a preliminary expense tax, was construed by the Supreme Court of Arkansas in Morris v. Drainage District No. 24, 150 Ark. 525, 234 S. W. 980, to require that tax levy orders be sufficient to pay the entire cost of a contemplated improvement.

Section 21-550 provides that if the first tax levied shall be insufficient to "complete" the improvement the Court shall make further levy for a sum or sums sufficient to "complete" the improvement. The section provides that total taxes in no case shall exceed the value of assessed benefits, and it provides that the performance of duties of the Commisisoners under the section may be enforced by mandamus at the instance of any person interested.

Section 21-562 provides that property owners may waive the resort to courts and may ratify and confirm all things done and may thereafter be forever barred from contesting proceedings up to "that time".

Sections 21-571 through 21-574 authorize co-operation with the Federal Government and maintenance of Federal levees by means of a maintenance tax.

2. A second statute of interest is Act 216 of 1947 of the General Assembly of Arkansas, Acts of Arkansas, 1947, No. 216, Page 478. This act provides that reassessment of benefits may be made as to particular pieces of real property within a district, not oftener than once a year, by lowering or raising the assessed benefits "as justice may require", though preserving the rights of creditors existing at the time of reassessment.

FEDERAL STATUTES

1. Necessarily involved in the action are provisions of flood control acts of Congress, particularly the so-called

"Overton Flood Control Act" of June 15, 1936, c. 548, 49 Stats. 1508 et seq., particularly Section 5 of that Act, 49 Stats. 1509, providing for Federal construction of levees along the White River upon local improvement districts' giving assurance that they will provide rights of way, drainage facilities, flowage and storage rights and easements across the lands and protection to the United States from damages on account of the use of areas for reservoir purposes in emergencies.

2. Also involved are the statutes on the subject of flood control, generally, of which the Overton Flood Control Act is a part. Particularly pertinent are the statutes in Title 33 U. S. Code, Sections 701-1 through 709, particularly such sections as 33 U. S. Code, Section 701-a, declaring the policy of Congress and showing that flood control has become a matter of national significance and that activities in connection therewith have become general functions of the Federal Government for the benefit of the public.

APPENDIX B

OPINION OF SUPREME COURT OF ARKANSAS

Present Law Proceeding

CLEMENTS, ET AL. v. BRONAUGH, ET AL., *No.* 9455.

Opinion delivered April 23, 1951, Reported 218 Ark. ——, 239 S. W. 2d 1.

In May, 1919, the White River Drainage District of Phillips and Desha Counties was organized under Act 279 of the Acts of the General Assembly of 1909 (and acts amendatory and supplementary thereto) for the overall purpose of building levees, drainage districts, flood gates, outlets and pumping plants, to eliminate flood and surface water. The District embraced approximately 169,000 acres belonging to some 1,600 property owners. The two appellants own 5,101.5 acres within the district. Total benefits assessed against all lands amounted to $8,500,000. Appellants' lands were assessed anticipated benefits in the amount of $340,477 against which taxes could be levied. By proper procedure, the improvement was undertaken and with Government aid of approximately $8,000,000 the levee has been built. The District has expended less than $500,000 to date.

September 2, 1949, the Board of Commissioners determined that additional drainage was necessary, to cost approximately $500,000, and filed petition in the Circuit Court for a bond issue in the amount of $230,000 to retire principal and interest on the then bonded debt. It was alleged in the petition, among other things, "that the construction of the pumping plant provided in the original plans can not be begun at this time, but that it will be constructed later." The Circuit Court entered an order granting the petition. The order contained this recital:

"It is understood that the construction of the pumping plant provided for in the original plans can not be begun at this time, but that it will be constructed later; that it will be necessary to issue additional bonds to do the work in an amount not to exceed $275,000, which will be on a parity as to security with the said $230,850 of bonds to be issued at this time; and that the Commissioners will at the proper time call upon the court to levy an additional tax."

The present suit was filed August 22, 1948, in the Phillips Circuit Court by the two land owners, appellants, to require the Commissioners of the District to re-assess benefits to the extent of reducing same by reason of the Federal aid in construction of the levee as a public improvement, and to report the amount to be expended and taxes necessary to be collected to complete the entire enterprise.

Appellees answered with a general denial and affirmatively pleaded that all issues of law and fact had previously been adjudicated and determined adversely to appellants in a former suit brought by appellants in the Phillips Chancery Court (and later on appeal, affirmed by this Court in Harris vs. Blackburn, 215 Ark. 195, 219 S. W. 2d 922), in which the same parties, lands and cause of action were involved; and appellees pleaded res judicata as a bar to the present suit. Following the filing of this response, the parties in a pre-trial conference (Sec. 27-401 to 27-403 inc., Ark. Stats. 1949 Supplement) stipulated that the entire record and transcript of the proceedings in Harris v. Blackburn, above, should be submitted and considered by the Circuit Court along with certain exhibits presented in the present suit including "Petition for Tax Levy, filed September 2, 1949, by Commissioners of said District; and Order of the Court, levying tax, order rendered September 2, 1949."

The case was taken under advisement by the trial court

and October 18, 1949, appellees' plea of res judicata was sustained. The Court's order recited: "By agreement of counsel the transcript of the record in the previous Chancery Court proceeding (containing the testimony, pleadings documentary evidence, rulings and decrees), the decision on appeal and petition for rehearing of the appeal were submitted to this Circuit Court for the determination of the plea of res adjudicata, together with briefs filed by all parties on the previous appeal from the Chancery Court. Also submitted were the tax levy order of this Circuit Court issued September 2, 1949, and petition for same (filed by respondents on September 2, 1949), docketed in this Court as No. 3417, the petition being entitled 'In the Matter of White River Drainage District of Phillips and Desha Counties, Arkansas' and headed 'Petition for Tax Levy', and the order levying a tax to be collected in annual installments from 1950 to 1965, the order having been issued without notice to petitioners herein and without any opportunity for them to be heard in respect thereto. * * *

"That the issues of law and fact presented in this cause (including contentions made by petitioners that they are being deprived of their property without due process of law, that their property is being taken, appropriated and damaged for public use without just compensation, that they are being denied equal protection of the laws, all in violation of Article 2, Sections 2, 3, 21 and 22 of the Constitution of Arkansas and Section 1 of the Fourteenth Amendment to the Constitution of the United States) are the same issues of law and fact which were presented or could have been presented in the previous litigation in chancery wherein the same parties were plaintiffs and defendants, respectively; that all issues of law and fact arising in this action were duly adjudicated by the Chancery Court of Phillips County, Arkansas, and the Supreme Court of Arkansas in the previous proceeding; that the

plea of res adjudicata asserted by the respondents herein should be sustained and that this cause should be dismissed."

We hold that the trial court was correct in sustaining appellee's plea of res adjudicata.

As has been pointed out, the previous original suit was filed May 7, 1947, in the Phillips Crancery Court and the present action was filed August 22, 1949, in the Phillips Circuit Court.

Appellants state the purpose of the present suit in this language: "Judgment for damages offsetting benefits, measured by the amount of benefits attributable to the pumping plant construction originally contemplated as a major part of the improvement for which the District was organized in 1919, but which is omitted from the construction program now being instituted. * * * In the alternative, petitioners assert their rights to an order of this Court, the ultimate effect of which will be that the improvement as planned (pumping plants) will be constructed, in accordance with the plain duty of the Commissioners."

It appears undisputed that appellants were parties to the former suit and the same lands and assessment of benefits were there involved and we hold that, in effect, the same allegations were contained in both cases and the relief sought, in effect, the same.

In the former suit, appellants alleged, among other things, "that the benefits assessed for construction of levees were made at a time when the District contemplated construction of the levees at its own expense, but since the United States has constructed this levee for the benefit of all the property owners who are protected by the levee, it is a common and not a special benefit, and the assessment levied for this purpose should be cancelled and set aside."

Their prayer was: "That the Court declare all actions

of the Board of Commissioners in the levying or assessing of taxes against the lands of the plaintiffs and others similarly situated, to be illegal and void.

"That the Court direct the Commissioners to refund to these plaintiffs all taxes heretofore paid by them for the past several years.

"That the Court declare the action of the Commissioners in changing the plans, to be illegal, and all actions of the Commissioners subsequent to such change in plans to be declared void and of no effect.

"That if the plaintiffs are not entitled to the relief prayed for in the foregoing paragraphs, that then the Court enter an order directing the Commissioners to re-assess the benefits in view of the present conditions.

"That when such re-assessment has been made, the Court enter an order directing the Commissioners to refund to the plaintiffs the taxes paid for the last several years.

"That the court enter an order directing the Commissioners to file a complete report, giving a detail year by year of all taxes collected, all expenditures made by the Commissioners, accounting for all moneys borrowed and the obligations outstanding, together with copies of all contracts heretofore let for drainage structures in the northern end of the District."

We said on the former appeal: "The appealing landowners urge with considerable force that a re-assessment became imperative when the Government 'stepped in' and relieved the District to the extent heretofore shown. This would be true if building the levee constituted such a radcal change in plans that a materially different undertaking resulted. Answer comes from most of the witnesses, who in discussing the conceptions of 1919-21, testified that a primary levee was required. It was projected under the Connolly plan, so named because of Connolly's cooperative work. Appellees' engineer testified that this

plan afforded better protection than the one suggested by Harrington, Howard & Ash."

In the present suit, appellants sought the following relief: "First: (a) for a re-assessment of the benefits standing against their lands, and, to the extent of the reduction of benefits by reason of Federal aid in the construction of the levee as a common or public improvement, for judgment for damages against the defendants; and (b) for a writ of mandamus directed to the defendants compelling them to report the amount of the deficiency of past and now proposed taxes to complete the originally planned improvement (that is to say, the amount of additional money which will be sufficient and will be required to complete said improvement), and further, upon reporting, to take such action as may be found necessary to the purpose of completing the said improvement in its entirety.

"Second: and in the alternative: (a) For a re-assessment of benefits standing against their lands, and, to the extent of the reduction of benefits on all grounds appearing in this petition, for judgment for damages pursuant to statute, against the defendant in the following amounts;"

It thus appears, as indicated, appellants sought, in effect, the same relief in both cases.

In the present suit, appellants are not questioning the validity of the additional bond issue, nor the tax levy, but as in the former case, are asking the Court to re-assess the benefits against their lands, a request that was refused under the former appeal. Appellants have not pleaded or shown any such change in plans or conditions from those existing in the former equity case to warrant an order at this time requiring the Commissioners to re-assess benefits against their lands. The construction or installation of pumping plant or plants was clearly provided as a part of the original improvement and also included in the

order for the new bond issue and these pumps must be provided by the Board. In fact, appellees concede that they must be provided and that they have no intention of omitting them from the improvement. However, under the undisputed evidence, it appears that the Board, under the advice of skilled and competent engineers, adopted a plan of construction involving three stages: First, building the levees; second, drainage; and third and last, the pumping plant or plants.

Broad powers and a large amount of discretion must be, and is, given the Board of Commissioners in making and building this tremendous and costly enterprise through all of its various stages of construction. We can not say that the Board has abused its discretion by delaying the building of the pumping plant until the last.

As indicated, the sustaining of the plea of res adjudicata does not preclude the appellants from taking suitable action looking toward the installation of the pumping plant or plants when the proper time arrives.

Since we are affirming the judgment on its merits, it is unnecessary to discuss the issue the appellees have raised concerning the motion for new trial.

Accordingly, the judgment is affirmed.

APPENDIX C

OPINION OF SUPREME COURT OF ARKANSAS

Previous Chancery Proceeding

HARRIS, ET AL. vs. BLACKBURN ET AL., No. 8850, delivered April 25; 1949, —— Reported 215 Ark. 195, 219 S. W. 2d 922.

GRIFFIN SMITH, *Chief Justice.*

Harris and those associated with him in this appeal own land in White River Drainage District of Phillips and Desha Counties. Blackburn was one of the District's three Commissioners. All were made defendants in a suit by landowners who claimed assessments were rendered invalid when original plans were changed; that re-assessments were necessary, and that refunds should be made. There were charges, including a failure to publish financial statments.[1]

The Districts as organized in May, 1919, under Act 279 of May 27, 1909, as amended, proposed to reclaim more than 169,000 acres, principally in Phillips County in the White River Backwater Area. Intention was to build levees, flood gates, pumping stations, dig drainage ditches, and, generally to make the lands available for cultivation. An example of the impaired condition of some tracts is found in the testimony of Lee Clements, who said that in 1933 he bought from the owner 2,600 acres for $240.[2] However, he had an option on more than 20,000 acres at $1 per acre.

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1. The other Commissioners were R. S. Bronaugh and E. T. Horner.
2. The lands were charged with delinquent taxes.

A survey by consulting engineers was filed in October, 1921. The estimated cost was $4,627,265, about $28 per acre. The Commissioners and landowners thought the investment was too great, a view shared by the consultants, who recommended that an attempt be made to procure Federal assistance. In the meantime, substantial obligations had been incurred for preliminary work, including the survey. Upon representation to Phillips Circuit Court that $25,000 in certificates of indebtedness were outstanding, and that orderly procedure required additional funds,—some to repay landowners for approximately $100,000 they had advanced,—an assessment of benefits filed in May, 1922, was confirmed in August. With approval of assessments the Commissioners reported on negotiations for Federal aid, but said it would be necessary to levy taxes for 1923 and 1924 to pay commitments. These representations resulted in a levy of three-fourths of one per cent of the assessed benefits, collectible in 1923 and 1924.

Up to this time there was no suggestion of discontent by any landowner. A seven-page stipulation shows virtual unanimity of purpose; and seemingly the delay now complained of was by common consent, based upon hope that Government grants, or independent levee work for which the District would not be bound, might lift enough of the burden to justify the project. In this situation the Commissioners appealed to Maj. Donald H. Connolly, District Engineer at Memphis, who in April, 1925, reported to the Mississippi River Commisson, and to the Chief of the Engineers of the U. S. Army.

The Overton Flood Control Act under which partial relief was finally procured became a law in 1936. Title 33, Sec. 702 J-2, U. S. C. A., specifically refers to the Tributary Levee Location Survey, White River Levee District. Under this plan levee construction was authorized, with express limitations like those mentioned in

Lessenberry v. Little Rock-Pulaski Drainage District No. 2, 211 Ark. 1046, 204 S. W. 2d 554, second footnote.

Appellants say that "after the project was abandoned" the Government constructed a levee along the left bank of White River—western boundary of the District; but neither the evidence nor the agreed statement justifies a finding that abandonment had occurred. After mentioning the indebtedness with which the District was faced in 1922, a stipulation is that "* * * for a period of fourteen years—from 1922 to 1936—the Commissioners, engineers and attorneys waged a concerted and continuous effort to obtain Government assistance to carry out the proposed improvements. * * *"[3].

A further agreement is that in complying with the Overton Act, "* * * it became necessary for each landowner to execute an agreement with the District in the nature of an easement across each tract, to the end that the Disrict could be in a position to comply with the terms of the Act of Congress." As a result, "from time to time" during 1937 and 1938, contracts were executed "by each and all of said landowners, including the plaintiffs herein and their predecessors in title." All conveyances made subsequent to the execution of these papers were subject to terms of the grants, deeds having been duly recorded. Large sums of money were spent by the District to meet Government requirements; and, according to the stipulation, more than 37 miles of drainage canals and diver-

3. Continuing, the agreed statement says: "During this period—from 1922 to 1936—the Board of Commisioners, the District's agents and employees, attended practically every Flood Control hearing in the House of Representatives and of the Senate of the United States to urge Congress to enact the necessary legislation whereby Federal assistance could be given to carry out the proposed improvements; that the efforts of the Board of Commissioners, its agents and employees, finally successfully culminated in the passage of the Overton Flood Control Act, * * *"

sion channels were constructed under agreement with the Government and in compliance with the Overton Act pertaining to "interior" drainage.

In August of 1942 Circuit Court approved a bond issue of $150,000 against assessed benefits of $7,500,000. The order contained a recital that '* * * when additional work can be carried on (weather and war conditions permitting), the District will be authorized * * * to borrow additional funds." Jurisdiction was retained "* * * to make orders * * * as funds may be needed * * * to carry on the drainage and flood control for which the District was organized."

November 21, 1942, Blackburn, as Chairman of the Board, addressed a communication to landowners in which he said that in dealing with the comprehensive problems involved "* * * your Commissioners feel that they should have the advice and suggestions of the property owners who are vitally affected, and to this end we have called a meeting so these questions may be discussed." The meeting was held November 25th. Those who attended were informed that they were to consider policies to be adopted by the Board "* * * in carrying out the over-all drainage program which has been designed, and for which the District has been organized." E. G. Green, the District's engineer, in estimating that "something in the neighborhood" of $200,000 would be required to complete the program, exhibited maps showing drainage canals that were to be constructed. He mentioned that dirt work was costing eight cents a cubic yard, and grubbing three cents—a total of eleven cents per cubic yard. The current tax rate of one-half of one per cent yielded $35,000 annually, an amount "wholly insufficient to carry out the program." However, if with approval of landowners the levy were increased by 25 per cent, "* * * then the work could easily be carried out over a period of years on short-term paper, with borrowings

from local banks at very reasonable rates of interest."

The minutes show that in response to these proposals Warfield Rogers, while stressing "the dire need of an adequate drainage system", expresed the view that this is not the time to carry on the work". The eight-cent price for excavation, he said, was too high. He thought that "after the war" dirt could be removed for not more than four cents, and others agreed with the estimate. Result of the discussions was that, with two exceptions, all voted to discontinue the work "* * * until some future date when it can be done at a cheaper price."

The landowners have appealed from an order sustaining a defense demurrer to all allegations of the complaint except those charging material changes in the plans and the prayer for damages resulting from improvident construction, inexcusable delays, etc. They attack the decree of dismissal from four angles: (1) Original plans were changed in material respects, rendering the assessment of benefits invalid. (2) Benefit assessments should have been revised when the Federal government paid the cost of constructing a main levee. (3) "Piecemeal" construction, and taxes levied for the purpose, are illegal. (4) The complaint stated a cause of action in chancery.

FIRST—*Plans Not Substantially Changed.* Appellants are in an anomalous situation in urging that an original plan was altered to their damage when the Government stepped in and with five or six million dollars to pay for an indispensable part of the undertaking they first thought would become a charge upon the lands. While admitting changes as the work progressed—some due to the Government's determination that levees should be built at a particular place—the District insists that, in the main, the work has followed the general outline drafted by Harrington, Howard & Ash in 1921. The fourteen-year delay between 1922 and 1936 is shown to have been solicited by landowners who continued to hope during a term partly

within the depression period that supplemental assistance would make it possible for the undertaking to be completed as at first conceived.

It is stipulated that none of the appellants excepted to benefit assessments, nor did predecessors in title; and it is undisputed that the law was tracked when the assessments were made. On the face of the record all court orders under which the District was formed, assessments made, or taxes levied, are regular. The attack is therefore an effort to collaterally reach judgments that became final many years ago, and it must fail. Main v. Drainage District No. 2 of Monroe County, 204 Ark. 506, 162 S. W. 2d 901.

In the forefront of assigned grounds justifying relief are appellants' assertions that construction work was started in the northern or "higher" part of the District; that a barrow pit left by the Government in building the levee serves as a catch-basin; that drainage from north to south causes water to cover lands otherwise free from minor overflows, and instead of being benefited they were actually damaged. But Harris, one of the appellants, admitted on cross-examination that in respect of the land he owned, nothing could be done without a levee: "Definitely, I am more fortunate because of Government construction * * * than I would have been if compelled to pay for it myself."

If in building a levee plans are materially changed, landowners are not without redress. It is given by statute. (Pope's Digest, Sec. 4476, 2 Ark. Stats. 21-517.) There is no contention here that the statutory remedy was involved. On the contrary, insistence is that appellants are mistaken when they assert that the major plans were departed from. The remedy is mentioned merely to stress the legislative policy of permitting a departure from primary plans and relegating injured persons to compensation as for damages. The section clearly discloses a belief

by the lawmakers that a district, once created, should not have its credit impaired, or interests of non-complaining landowners adversely affected, by minority dissents, once the undertaking is definitely launched. Rights given landowners were discussed in an opinion by Judge Hart, who said that if, by reason af any change in plans of a drainage district, an assessment becomes inequitable, the aggrieved person may petition the county court for a reassessment; and, in the absence of fraud, this right precludes resort to equity, and is exclusive. Hudson v. Simonson, 170 Ark. 243, 279 S. W. 780.

SECOND—*Necessity for Revising Assessments*: The appealing landowners urge with considerable force that a reassessment became imperative when the Government "stepped in" and relieved the District to the extent heretofore shown. This would be true if building the levee constituted such a radical change in plans that a materially different undertaking resulted. Answer comes from most of the witnesses, who in discussing the conceptions of 1919-21, testified that a primary levee was required. It was projected under the Connolly plan, so named because of Connolly's co-operative work. Appellees' engineer testified that this plan afforded better protection than the one suggested by Harrington, Howard & Ash. The witness affirmed the Distrtci's purpose to first determine the maximum volume of water, what facilities would be required to effectively deal with it, and an intent to proceed to completion without material deviation from the original scheme.

Levee construction had not been finished when the case was tried. E. G. Green, engineer, testified that slightly more than four miles were yet to be built around the southern end of Old Town Lake, "* * * and the other 36 miles of levee still have to be enlarged from 1½ to 3 feet ingrade." The District must construct 75 miles of canals. Present tax receipts yield $35,000 annually.

From this income rights-of-way must be furnished, flood gates operated, the partial system maintained, and all expenses met.

THIRD—*"Piecemeal" Construction*: The Chancellor's determination that a preponderance of the evidence did not show the work to have been done in such a disconnected way as to prejudice rights of the appellants must be sustained. Minutes of meetings held by the Board were not successfully impeached. They show that the fourteen-year delay was a groping period during which the landowners, if not actually seeking delays, impliedly consented to the inactivity. They were unwilling to abandon the project, so kept the District intact as a legal entity in the hope that Federal help would come. Speculative values of the lands were tied to drainage. Without it most of the acreage was worth little more than timber stumpage, and much was not accessible to roads.

FOURTH—*Did the Complaint State a Cause of Action?* It is not affirmatively charged that the Commissioners acted fraudulently. Unless this implication necessarily arises from allegations that in spite of assurances work would be pushed as expeditiously as practicable there were mental reservations that it would be unreasonably delayed, a court of equity should not interfere. As a Board, the Commissioners acted under legal authority, and their discretion will not be infringed. It appears, however, that action on the demurrer has become unimportant. Wide range taken by the testimony touched most issues in the complaint, and brought to the trial court's attention the material points of controversy.

If full effect be given to apparent purposes of those who attended the November meeting in 1942, two Commissioners who are appellees here were the only attending landowners not willing to delay the work. The Overton Flood Control Act, with its authorization for levee work, had been in effect for more than six years, and the prop-

erty owners knew then that Federal money was being spent in their behalf. In 1937 and 1938 these men conveyed easements, thereby arraying themselves with the Commissioners in assuring the Government that "drainage facilities made necessary by construction of the levee" would be provided; that the District would acquire and provide without cost to the United States "all flowage and storage rights and easements over, upon, and across the lands and properties within the protected area", etc. Certainly the Government was dealing with the District and with the landowners upon the basis of a definite improvement, to be completed according to plans.

The stipulation is explicit in saying that easement contracts were executed "by each and all of said landowners, *including the plaintiffs herein and their predecessors in title.*" Pope's Digest, Sec. 4492, 2 Ark. Stats. 21-562, allows property owners in a drainage district to waive the right to resort to courts, and permits them to "* * * absolutely ratify and confirm what has been done by the Board of Commissioners and all other officials with reference to the district." Thereafter they are "forever barred from testing or contesting in (any) way the validity of the proceedings up to that time, the assessments made, or the tax levied for the payment of principal and interest of bonds, or for any other purpose."

The stipulation had the effect of bringing appellants within the terms of the Act when each executed the easement contract, for the implied assurance was that the District existed as a legal entity.

Affirmed.

SEP 21 1951
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 276

W. LEE CLEMENTS and J. L. BRITT, *Petitioners,*

vs.

R. S. BRONAUGH, ET AL., Commissioners, and WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS, *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 276

W. LEE CLEMENTS and J. L. BRITT, *Petitioners,*

vs.

R. S. BRONAUGH, ET AL., Commissioners, and WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS, *Respondents.*

STATEMENT AND RESPONSE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondents, White River Drainage District of Phillips and Desha Counties, Arkansas, and its Commissioners, move the Court to deny the Petition for Writ of Certiorari for the following reasons:

1. That on the 27th day of May, 1947, the Petitioners, W. Lee Clements and J. L. Britt, and four other landowners, brought a suit in the Chancery Court of Phillips County, Arkansas, against these Respondents alleging that all actions of the Board of Commissioners of said District in levying and assessing taxe were illegal and void; that their lands had been damaged and would not be benefited by the

construction of said project; that the assessment of benefits was illegal and void; that the original plans had been abandoned or changed and that a reassessment of the benefits was necessary; that by reason of the failure of the Commissioners to construct a pumping plant and provide necessary drainage, their lands were inundated by surface water and thereby damaged instead of benefited; that by reason of construction of levees by the United States, the assessment of benefits was rendered void, and therefore should be cancelled. (R. Vol. I, Pages 23 to 29 incl.) To this Complaint the District and Commissioners filed a Demurrer, which was sustained in part and overruled in part by the Chancery Court. The Demurrer was overruled as to all the allegations in the Complaint except the allegations which related to change of plans and aleged damages. (R. Vol. I, Pages 29 and 30 incl.) To that portion of the Complaint not sustained by Demurrer, the District and its Commissioners filed an Answer alleging that the District had been formed in the manner required by the laws of Arkansas; that the assessment of benefits had been made in compliance with the Statute; that due notice was given to each landowner of the filing of the assessment of benefits, and giving to each of them the opportunity to file exceptions thereto; that each and all of the landowners within the District had entered into a contract with the District and the United States (Exhibit H, R. Vol. I, Pages 45 to 48 incl.), whereby they ratified and approved the method of constructing the project in accordance with Flood Control Act of Congress, approved June 15, 1936 (U.S.C.A. Title 33, Sec. 702J-2). On the 22nd day of April, 1948, this cause was tried upon its merits in the Chancery Court of Phillips County, Arkansas, the testimony of many witnesses was taken in open court, together with Agreed Statement of Facts. The Chancery Court, after having heard testimony and argument of Counsel for the respective parties, did on the 22nd day of April, 1948, enter a Decree finding that the assessment of benefits were made and levied in the manner

required by law; that the assessment of benefits were made upon a completed improvement; that the assessment of benefits were just and equitable; that there have been no substantial change of plans which would necessitate reassessment of benefits; that the lands in controversy have not been damaged; that no part of the proposed improvement had been abandoned, and that it was the policy of the Commissioners of the District to complete said proposed improvement, and thereupon the Court dismissed the Complaint for want of equity; that the Petitioners, W. Lee Clements and J. L. Britt, and other landowners associated together with them, perfected an appeal to the Supreme Court of Arkansas.

On April 25, 1949, the Supreme Court of Arkansas affirmed the Decree of the Phillips Chancery Court (*Harris, et al.*, v. *Blackburn, et al.*, 215 Ark. 195; 219 S.W. (2) 922) (R. Vol. II, Pages 1 to 8 incl.) Petition for Rehearing was filed in which the plaintiffs there, Petitioners here, contended that their property was being taken in violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States. The Petition for Rehearing was denied on May 23, 1949. The Petitioners, W. Lee Clements and J. L. Britt, and their associates did not petition for Writ of Certiorari to this Court. That the Decree of the Phillips Chancery Court and the decision of *Harris, et al.*, v. *Blackburn, et al., Supra*, became final, conclusive and binding upon the parties thereto, including the Petitioners W. Lee Clements and J. L. Britt.

2. The present action, now sought to be reviewed, was commenced on August 22, 1949, some four months after the rendition of the decision in *Harris, et al.*, v. *Blackburn, et al., Supra*, when the Petitioners, W. Lee Clements and J. L. Britt, filed a Petition in the Circuit Court of Phillips County, Arkansas, against the Respondents, White River Drainage District of Phillips and Desha Counties, Arkansas, and its Commissioners, raising the same issues of law and fact as were presented and adjudicated in the former proceed-

ing of *Harris, et al.*, v. *Blackburn, et al., Supra.* (R. Vol. I, Pages 3 to 15 incl.). On the 3rd day of September, 1949, the Respondents filed their Response, alleging that all of the issues of law and fact raised by the Petition had been duly litigated, determined and adjudicated by the Chancery Court of Phillips County, Arkansas, and the Supreme Court of Arkansas in *Harris, et al.*, v. *Blackburn, et al., Supra;* that the Petitioners, W. Lee Clements and J. L. Britt, were parties to the former suit, and that the Decree as affirmed by the Supreme Court, had become final and conclusive, and Respondents pled res judicata as a full and complete defense. (R. Vol. I, Pages 16 to 18 incl.)

On October 18, 1949, the Circuit Court sustained the plea of res judicata and dismissed the Petition, but the Order was not entered of record until November 9, 1950. (R. Vol. I, Pages 19 to 22 incl.) In presenting the plea of res judicata, it was stipulated and agreed between Counsel that the transcript of record in the former Chancery case and in the Supreme Court be submitted for the purpose of determining whether the plea of res judicata should be overruled or sustained. From the Order sustaining the plea of res judicata, W. Lee Clements and J. L. Britt perfected an appeal. On April 23, 1951, the Supreme Court of Arkansas handed down its opinion affirming the judgment and order of the Circuit Court sustaining the plea of res judicata. *Clements, et al.*, v. *Bronaugh, et al.*, 239 S.W. (2) 1. (R. Vol. II, Pages 11 to 17 incl.)

The Petitioners, W. Lee Clements and J. L. Britt, have filed in this Court their Petition for Writ of Certiorari to review the decision of the Supreme Court of Arkansas, and are attempting to have this Court review the issues of law and fact which were duly adjudicated in the former Chancery proceeding.

3. The Petition for Writ of Certiorari does not come within the scope of Paragraph 5, Sub-section (a), Rule 38 of this Court, as the same discloses upon its face that no Federal question is involved giving this Court jurisdiction

to review the decision of the Supreme Court of Arkansas; that the State Courts in sustaining the plea of res judicata was applying local and general law, and does not raise a Federal question.

4. That the Petitioners, W. Lee Clements and J. L. Britt, were parties plaintiffs in the former litigation in the Phillips Chancery Court and in *Harris, et al.,* v. *Blackburn, et al., Supra,* and they have been fully heard and afforded every opportunity to present their cause, and they have not been deprived of any of their Constitutional rights because the Supreme Court of Arkansas sustained the plea of res judicata.

5. That the allegations contained in the Petition for Writ of Certiorari questioning the legality and validity of the acts of the Commissioners in the method of constructing the project are administrative acts and matters of detail which are largely within the discretion of the Commissioners, and are not, therefore, regulated or controlled by the Federal Constitution.

6. The record discloses that the assessment of benefits were made in conformity with the law; that due and ample notice was given all property owners of the filing of the assessment, and opportunity was afforded to each of them to file their exceptions (R. Vol. I, Page 35, Paragraph 6); that the Petitioners, W. Lee Clements and J. L. Britt, did not file objections or exceptions within the time and manner required by law, and the Order approving the assessment of benefits became final and conclusive; that the assessment of benefits were also approved in the former Chancery proceeding, wherein these Petitioners were parties thereto, and the Decree of the Chancery Court was affirmed by the Supreme Court in *Harris, et al.,* v. *Blackburn, et al., Supra,* and that Decree, as so affirmed, became final, conclusive and binding upon the parties.

7. That the Order made by the Circuit Court on the 2nd day of September 1949, authorizing the Commissioners

to issue bonds for construction work and increasing the tax rate to ¾ of 1% of the assessed benefits, did not violate the Due Process clause of the Federal Constitution, as it appears therefrom that due and ample notice was given to each and all of the property owners and an opportunity was afforded to each of them to file exceptions or objections to the assessment of benefits; that the assessment of benefits as made thereunder, and not the tax levy, determines the Constitutional question.

8. The record discloses that the Petitioners, W. Lee Clements and J. L. Britt, were parties plaintiffs in the former proceeding in the Chancery Court of Phillips County, Arkansas, and that their rights were duly adjudicated and the Decree was affirmed in *Harris et al,* v. *Blackburn, et al.,* Supra, and the Supreme Court of Arkansas in *Clements, et al.,* v. *Bronaugh, et al., Supra,* had the right, power and authority to sustain the plea of res judicata, and such decision did not deprive these Petitioners of any of their Constitutional rights.

WHEREFORE, Respondents pray that the Petition for Writ of Certiorari be denied.

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BRIEF IN SUPPORT OF RESPONSE.

I.

Decision of State Court Applying Principle of Res Judicata Does Not Raise a Federal Question.

Respondents insist that the Petition for Writ of Certiorari does not fall within that class of cases provided for in Paragraph 5, Sub-section (a), Rule 38, promulgated by this Court. The State Court has not decided a Federal question not heretofore determined by this Court, nor has it decided a question not in accord with applicable decisions of this Court. No Federal question is involved in this proceeding. In the decision of *Clements, et al.*, v. *Bronaugh, et al.*, 239 S.W. (2) 1, the State Court has construed and interpreted one of the previous decisions, wherein the Petitioners, W. Lee Clements and J. L. Britt, were parties thereto. The Circuit Court and the Supreme Court, on appeal, ruled and decided that all of the issues of law and fact presented in the instant case had been duly adjudicated and determined in the previous Chancery case, the decree having been affirmed in *Harris, et al.*, v. *Blackburn, et al.*, 215 Ark. 195, 219 S.W. (2) 922. The principle of res judicata was appropriately applied. This decision is in accord with decisions of this Court.

In *Chouteau, et al.*, v. *Gibson*, 111 U. S. 200, 28 L. Ed. 400, the Court was called upon to review a decision of the Supreme Court of Missouri, the State Court having held that previous litigation between the same parties had become conclusive. This Court, in passing on the question, said:

> "Such being the case, it is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a former judgment, but whether the right had been once

judicially determined so as to become res judicata between the parties".

In *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 71 L. Ed. 959, this Court was called upon to pass on a very similar state of facts and questions of law. This was a suit to cancel a tax bill of an improvement district organized under the laws of Missouri, in which the plaintiffs contended that the levy of tax was arbitrary and abusive; that the improvement was general rather than local; that the method of fixing the benefits were arbitrary, discriminatory and unreasonable, and that the assessment exceeded the benefits. It appears that the objections made by the appellees were decided by the Circuit Court and that its judgment was not open to collateral attack. This Court, in passing upon the question, said:

> "That the judgment is binding upon the parties and their privies and hence not open to collateral attack would seem to be the only reasonable construction of the statute if that question were for us to decide. But the Supreme Court of Missouri, since the pendency of the present suit, has held that the judgment rendered by the Jackson County circuit court in a similar proceeding is not open to collateral attack by the property owners within the benefit district and that such property owners may not litigate in another suit, questions, including the constitutionality under the 14th Amendment of the assessments levied, which might have been raised in the circuit court proceeding".

The judgment of the Circuit Court of Phillips County approving and confirming the assessment of benefits, after due notice to property owners as provided by law, became final and conclusive; the Decree of the Chancery Court in the former suit brought by these Petitioners against the Respondent district and its Commissioners, holding that the assessments were just, reasonable and equitable, which Decree of the Chancery Court was affirmed by the Supreme Court of Arkansas in *Harris, et al.*, v. *Blackburn, et al.*,

Supra, was and is binding upon the Petitioners, W. Lee Clements and J. L. Britt, who were parties to the Chancery proceeding as to all issues of law and fact raised or which could have been raised in those proceedings. In the present proceeding the Supreme Court of Arkansas did no more nor less than apply the principle of res judicata. This decision of the Supreme Court of Arkansas is in accord with the decisions of this Court.

The principle of res judicata was well established in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; 84 L. Ed. 329. The Court said:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end' ".
>
> *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 74 L. Ed. 972.
>
> *Cromwell* v. *Sac Company,* 94 U. S. 351, 24 L. Ed. 195.

The Petitioners now contend that the Decree of the Phillips Chancery Court and the decision of the Supreme Court of Arkansas affirming the Decree in *Harris, et al.,* v. *Blackburn, et al., Supra,* is not binding upon them even though they were parties to that proceeding; that the decision of the Supreme Court of Arkansas in *Harris, et al.,* v. *Blackburn, et al., Supra,* and in the present proceeding was erroneous and that by reason of the erroneous decisions they have been deprived of their Constitutional rights. This contention is without merit. In *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709, the Court laid down the well established rule:

> "It is firmly established that, when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States, and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late". (Many cases there cited)

The record filed in support of the Petition for Writ of Certiorari clearly discloses that all of the issues of law and fact raised in the present proceeding were duly litigated and adjudicated between the same parties in the former proceedings in the Chancery Court and in *Harris, et al.*, v. *Blackburn, et al., Supra.* The Petitioners here, plaintiff in the Chancery case, were given a full opportunity to be heard. One of the Petitioners, Mr. Clements, testified in his own behalf; they employed engineers and introduced considerable evidence undertaking to set aside the assessment of benefits and to justify a reassessment of benefits; they were unsuccessful and are now seeking in this proceeding to have this Court reopen the case of *Harris, et al.*, v. *Blackburn, et al., Supra.* Petitioners have had their day in Court; they have not been deprived of any Constitutional rights either under the Constitution of the State or Arkansas or the Constitution of the United States.

The decision of *Clements, et al.* v. *Blackburn, et al., supra,* is undoubtedly in accord with the decisions of this Court on the question that a decision of the State Court applying the principle of res judicata does not raise a Federal question, nor does it deprive the unsuccessful litigant of any of his rights and immunities under the State and Federal Constitutions.

The facts in the case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, cited by Counsel for Petitioners, can be easily distinguished from the facts in the case at bar. In that case, the plaintiffs had not been afforded an opportunity to be heard, and the Court

refused to grant them relief because the State Court in a former proceeding to which they were not parties had decided that the administrative relief would be unavailing. Such is not the case here—the Petitioners have duly litigated their cause in a Court of competent jurisdiction and the Decree, as firmed in *Harris, et al.* v. *Blackburn, et al., supra,* has become final and conclusive.

The case of *Hansberry* v. *Lee,* 311 U. S. 32, 85 L. Ed. 22, also relied upon by Counsel for Petitioners, is not in point for the reason in that case this Court held the Petitioners were not bound by a judgment in personam in a previous litigation to which they were not parties, and the Court by so doing deprived them of their Constitutional rights. The decision of the Supreme Court of Arkansas in the instant case does not conflict with the principles of law announced by this Court in *Angel* v. *Bullington,* 330 U. S. 183, 91 L. Ed. 832, cited by Counsel for Petitioners, but on the contrary supports Respondents views, as stated by Mr. Justice Frankfurter in the above cited case:

> "To allow such a second suit is to say that a Federal right in issue in a State Court evaporates because the State Court calls it a State right and the litigant accepts the decision. If tolerated, our Federal system would afford fine opportunities for needlessly multiplying litigation in this way. The doctrine of res judicata is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties."

II.

Assessment of Benefits as Made Did Not Violate Federal Constitution.

The Petitioners contend that the original assessment of benefits made in the Respondent district are unreasonable, discriminatory and that by reason thereof they are being deprived of their property without due process of law; such a contention is fallacious. The record discloses that the Commissioners of the Respondent district complied with the laws of Arkansas in making the assessment, that notice of the filing of the assessment was duly given, and every property owner was given the right to file his exceptions or objections to the assessment. Neither the Petitioners nor their predecessors in title filed any exceptions or objections to the assessment in the time and manner required by law. The assessment of benefits was ratified, confirmed and approved by the Circuit Court; that said assessment was again approved by the Phillips Chancery Court in a proceeding in which these Petitioners were parties, and the Decree of the Chancery Court affirmed by the Supreme Court in *Harris, et al.* v. *Blackburn, et al., supra.* The law is well setted by many and numerous decisions of this Court to the effect that if notice and opportunity is afforded the property owner to except and object to the assessment of benefits before the assessment of benefits become a final lien upon the lands, then the Constitutional requirement of Due Process has been met and fulfilled. It is the assessment of benefits and not the levy of tax upon the assessment of benefits that determines the Due Process clause of the Federal Constitution. These questions are so well settled by this Court that we do not deem it necessary to quote from the many decisions to this effect.

Soliah v. *Heskin,* 222 U. S. 522, 56 L. Ed. 294.
Miller v. *Sacramento & San Joaquin Drainage District,* 256 U. S. 129, 65 L. Ed. 859.
Spencer v. *Merchant,* 125 U. S. 345, 31 L. Ed. 763.
Utley v. *St. Petersburg,* 292 U S. 106, 78 L. Ed. 1155.

Corry v. *Campbell,* 154 U. S. 629, 24 L. Ed. 926.
McGregor v. *Hogan,* 263 U. S. 234, 68 L. Ed. 282.
Kansas City S. R. Co. v. *Road Imp. Dist. #3,* 266 U. S. 379, 69 L. Ed. 335.
Houck v. *Little River Drainage Dist.,* 239 U. S. 254, 60 L. Ed. 266.
Beck v. *Missouri Valley Drainage Dist.,* 46 Fed. (2) 632. This Court denied certiorari, 284 U. S. 618, 76 L. Ed. 527.

We have intentionally refrained from making an extensive argument on the question of the assessment of benefits, as the validity of the assessment of benefits in this case has been approved by the Circuit Court, the Chancery Court and the Supreme Court of Arkansas. The question as to whether the lands of the Petitioners were benefited or damaged is purely a question of fact. This issue was litigated by the Petitioners in the former proceeding, and was determined adversely to their contentions. They have had their day in court—not once, but twice—and can no longer contest or raise any question as to the validity of the assessment of benefits.

III.

Tax Levy Did Not Violate Due Process Clause of the 14th Amendment of the Federal Constitution.

Petitioners also contend that they were deprived of their Constitutional rights by virtue of the Order of the Circuit Court made on the 2nd day of September, 1949, approving a bond issue for drainage work, increasing the rate of taxation from ½ of 1% to ¾ of 1% on the assessment of benefits and postponing the construction of a pumping plant. Petitioners claim they had no notice of this proceeding, although the record here reflects that the present proceedings were filed on August 22, 1949, some eleven days before the Order of the Circuit Court was entered. Petitioners were parties to this suit when the Order was made, and if they cared to object or resist the same they had a right to perfect an appeal. Such an appeal would have held the

Order of the Circuit Court in abeyance until the appeal was disposed of—this, the Petitioners did not do.

The reason they did not appeal was no doubt due to the fact that the Supreme Court of Arkansas in *Arkansas Louisiana Highway Improvement Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355, decided that notice is not necessary when the tax rate is increased or decreased on the assessment of benefits The Court, in that case, said:

> "The answer to this contention is that there is no constitutional requirement, either express or implied, that notice shall be given of the fixing, at any time, of the amount of annual installments. All of the constitutional requirements are complied with in notice and an opportunity to be heard on the question of the amount of the assessment of benefits, which is the basis of the annual installments."

This decision is in accord with the decisions of this Court:

Voigt v. *Detroit,* 184 U. S. 115, 46 L. Ed. 459.
Utley v. *St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155.
Beck v. *Missouri Valley Drainage Dist.,* 46 Fed. (2) 632. Certiorari denied, 284 U. S. 618, 76 L. Ed. 527.

IV.

Method of Construction Does Not Raise a Federal Question.

In answer to Petitioners contention that the Board of Commissioners of the Respondent district are proceeding in an arbitrary manner in carrying on the construction work of this project, we insist that this contention is without merit for this does not raise a Federal question. This question of fact was also litigated in the former Chancery proceeding in which the Petitioners were parties thereto. The State Courts approved the method of construction adopted by the Commissioners. The Court held that on a project of this magnitude, according to the best engineering advice, there would be three stages of construction, (1) levees, (2) drainage, and (3) pumping plant.

Questions of method and detail in construction of a public improvement are not regulated or controlled by the Federal Constitution. These are matters which are left entirely to the State Courts in the interpretation and construction of its own statutes.

Davidson v. *New Orleans*, 96 U. S. 97, 24 L. Ed. 616.
Goldsmith v. *Prendergast Construction Co.*, 252 U. S. 12, 64 L. Ed. 427.

V.

All Issues of Law and Fact Here Presented Are Res Judicata.

Petitioners contend that a reassessment of benefits became necessary because the Federal Government under the Flood Control Acts contributed to the cost of construction of the levees. This contention is without merit. The fact that the Federal Government has contributed to the cost of construction of part of the project undoubtedly rebounded to the special benefit of the property owners and having been benefited, Petitioners cannot now contend that their property is being taken without Due Process of law. No tax has been levied to construct levees—taxes have been levied and will continue to be levied for the maintenance of levees, the furnishing of rights-of-way for levees, and for drainage. When the pumping plant is installed additional taxes will be levied for this purpose. The Court must bear in mind that this was one of the issues of fact and law that was raised by the Petitioners in the former Chancery proceeding and in *Harris, et al.* v. *Blackburn, et al., supra.* This issue is also res judicata.

After reading Petitioners' Brief, we are unable to determine whether or not this is a Petition to review *Harris, et al.* v. *Blackburn, et al., supra,* or *Clements, et al.* v. *Bronaugh, et al., supra.* If this is an attempt to review the decision of *Harris, et al.* v. *Blackburn, et al., supra,* the time has long since expired for the filing of a Petition for Writ of Certiorari. This decision was rendered several years ago, and if the Petitioners thought their Constitutional rights were

in jeopardy, it was their duty to have petitioned for a Writ of Certiorari in that case before the time for filing such petition expired. It appears to us that the sole question before this Court is whether or not the Petitioners were deprived of any of their Constitutional rights in *Clements, et al.* v. *Bronaugh, et al., supra,* applying the principle of res judicata. This question must necessarily be answered in the negative by reason of the many decisions of this Court heretofore cited in this Brief, to the effect that a decision based upon res judicata does not present a Federal question.

We adopt as our concluding remarks the language used by Mr. Justice Roberts in sustaining the plea of res judicata in *Baldwin* v. *Iowa State Travelling Mens' Association,* 283 U. S. 523, 75 L. Ed. 1244:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

We submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

W. LEE CLEMENTS AND J. L. BRITT ..... *Petitioners,*

v. No. 276

R. W. BRONAUGH, GEORGE BLACKBURN AND E. T. HORNOR (COMMISSIONERS OF WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS) AND WHITE RIVER DRAINAGE DISTRICT OF PHILLIPS AND DESHA COUNTIES, ARKANSAS ..... *Respondents.*

REPLY BRIEF ON PETITION FOR A WRIT OF *CERTIORARI*

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REPLY BRIEF ON PETITION FOR A WRIT OF *CERTIORARI*

The relief sought by Petitioners in this action, and their desire in respect to the completion of the improvement for the construction of which the Respondent District was established, is that the Respondents either build the improvement or cease taxing against benefits which were calculated in the year 1922 (R. Vol. I, 44) for the sole purpose of enabling them to build it. A more reasonable desire can hardly be conceived. Their action was begun in the Circuit Court, the court of law of Arkansas, as the opinion of the State Supreme Court in the previous Chancery proceeding directed that it should be (R. Vol. II, 1-8), and their cause involves and was predicated upon facts involving new conditions which did not exist at the time of the previous action. The new tax order and the new, inadequate construction program, which will burden them, without benefiting them, probably for the rest of their lives, did not exist at the time of the earlier case. In addition, Petitioners demand that the Federal levee, a common or general im-

provement be removed from the basis of taxation, there being no further use for the portion of the assessment of benefits calculated for construction of the levee as a local improvement by the District.

Now that relief has been denied both in equity (in the previous action) and at law (in the present action), the Petitioners must, unless this Court comes to their aid, stand by and see their lands become a part of the domain of the District, which is already, in fact, using them as a reservoir. Thereafter it will be of small moment to the Petitioners here whether the complete improvement, without which their lands will never be productive, are ever built in their lifetime, or are built at any time; for, with their lands lost, their interest ceases, together with their very right to insist that the Respondents perform their duties in a manner consistent with the Constitution of the United States. Further, if the affairs of the District continue under the present program, the Respondents will have no occasion ever to build the complete improvement, for they will have acquired the convenient substitute, at the expense of Petitioners, of large areas of low lands for the benefit of the higher areas. It is submitted that a plainer case of actual confiscation cannot be imagined. In addition, unless review is granted, there will have been established a new principle of taxation whereby taxes for special local purposes may be freely exacted against benefits from general, common improvements constructed by the United States with general funds as a part of the tremendously expanded program for national flood control.

If the State Court judgment is permitted to stand, these things will have been accomplished not after a hearing and determination on the merits of the contentions, but in the name of procedural phrases mis-applied. Consideration of the questions was refused by the state court in the first action on the ground that the court of equity had no jurisdiction to determine them, and, anomalously, in the second action on the ground that the questions had been previously determined. The conclusions operate not only to accomplish the things above stated, but they also, in a singularly effective manner, make the jurisdiction of this Court de-

pendent upon whatever descriptive labels a state Court elects to inject into its decisions.

Respondents, in their Brief, would have this Court glance at the descriptive label, *res judicata,* and automatically decline to proceed, without analysis and without appreciation of the inappropriateness of the term to the case. The arguments advanced by Respondents are actually based upon assumptions founded only upon themselves. It is asserted, for example, in the first and fifth arguments, at Pages 7 and 15 of Respondents' Brief, that *res judicata* precludes further consideration of the case. Statements of principle, removed from their contexts, are then quoted from decisions of this Court. No one would argue against the quoted principles as abstract statements of law. The situation here is that those admittedly sound principles have no application to this particular case.

In the second argument, on page 12 of Respondents' Brief, assertions are made which have no discernible relation to the matters here presented. The Respondents project themselves backward, in time, to the year 1922, when the assessment of benefits, foundation for all subsequent taxation, was tabulated. Respondents seek to forestall corrective action by arguing the propriety of the assessment when it originally was issued some thirty years ago. Petitioners are concerned not with its original validity, but with the fact that the original judgment establishing the District and assessing benefits for *prospective* operation was never carried out and will not be performed in the foreseeable future.

Respondents ignore the fundamental fact that the assessment by its nature merely laid the foundation for action in the future, the required action having never been undertaken and the fundamental purpose of the assessment having never been fulfilled.

The third argument in Respondents' Brief, at page 13, is apparently a digression, the purpose of which is not clear. At first, it is suggested that Petitioners could appeal from the tax levy order rendered on September 2, 1949; yet, in the next breath, it is suggested that notice of the order need not have been (as, in fact, it was not) given to the

Petitioners. (R. Vol. I, 20). The new order (and inadequate construction program for which it was obtained) is incorporated into this proceeding, and Petitioners' claims respecting the present conditions under which the District is operating were necessarily passed upon in the decision of the state court. As noted in the Petition for Writ of *Certiorari*, this action was instituted not only at the very invitation of the state court in its previous opinion in the Chancery suit (R. Vol. II, 1-8) but under the express provisions of the statutes of Arkansas authorizing reassessment of benefits as often as once a year; and the alternative relief was sought under provisions authorizing Petitioners to enforce by *mandamus* the performance of the duty to complete the improvement. (Appendix A. to Petition, Pages 23 and 24, Sections 21-517, 21-519, 21-550, of Vol. II, Ark. Stats. 1947 Annotated; and Act 216 of 1947 of the General Assembly of Arkansas, page 478 of the Acts of Arkansas for 1947).

In the fourth section of Respondents' Brief, at page 14, it is suggested that methods and details of construction are state affairs. Petitioners desire nothing less than to have this Court or the state court enter into the business of construction. The objections are addressed not to the manner and details of construction or to the benefit derivable from the improvement planned in 1919, had it been completed, but rather to the fact that although taxation against improvement benefits continues there is no reasonable prospect of its completion at any foreseeable time, and that although taxation against levee construction benefits will be exacted for the next fifteen years, there remains no occasion for levee construction, the Federal Government having erected a substitute levee as a general flood control project, obviating further use by the District of the large portion of the assessment established in 1922 for the purpose of financing the construction of the then planned local levee. The decisions cited by Respondents are concerned altogether with different factual problems and, it is submitted, have no application to the present case.

By denying the Petitioners any real hearing in the present proceeding, the Supreme Court of Arkansas has

effectively passed upon the Federal claims discussed in the Petition for a Writ of *Certiorari,* of which the state court is not the final judge. The previous Chancery decision (R. Vol. II, 1-8) took away the right to present such claims and objections in equity as to the conditions then existing, and in lieu of that right gave, as an adequate remedy at law, the right to petition for reassessment in the law court. The decision in the present case, review of which is now sought, (R. Vol. II, 11-17), took away the right to proceed at law, after Petitioners had been deprived of their right to be heard on the merits in equity under the express direction that the law court was the forum in which relief should be obtained. The elimination of all remedies and the effective denial of all rights, both under conditions existing at the time of first action and changed conditions at the time of the second, was thus accomplished, without consideration of the merits of the claims in either forum. It is immaterial for purposes of the Petition for Writ of *Certiorari* that the result was accomplished by judicial decree rather than by other instrumentalities of the State. This court has forbidden such a result whatever the method by which the attempt has been made to accomplish it. *Brinkerhoff-Faris Trust & Savings Co.* v. *Walter O. Hill,* 281 U. S. 673. In similar manner, the Circuit Court of Appeals for the Fourth Circuit condemned such a violation of elementary principles of reason and justice in *Duke Power Company* v. *South Carolina Tax Commission,* 81 F. 2d 513, where different mechanics were employed.

In conclusion, it may be noted that a petition to this Court for Writ of *Certiorari* to review the previous Chancery decision would have been groundless; for, assuredly it would have been of no concern to this Court that the State of Arkansas might require that such actions be brought in the law courts of the state rather than in its separate courts of equity. Now, however, by virtue of the decision in the second action, the only other state forum available to Petitioners has denied its facilities to them. The state has thus effectively denied all relief in connection with claims based upon rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. By denial of all relief in all forums, the Federal questions have

now been definitely and necessarily decided, and review is now appropriately sought.

WHEREFORE, it is prayed that the Petition for a Writ of *Certiorari* be granted.

Respectfully submitted,

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October 23, 1951.